NO: 17-5554

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

DENARD STOKELING

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.1(8), Petitioner Denard Stokeling wishes to alert the Court to the Sixth Circuit Court of Appeals' recent decision in *United States v. Yates*, ___ F.3d ___, 2017 WL 342084 (6th Cir. Aug. 9, 2017), issued after the petition for writ of certiorari was filed in this case. In *Yates*, the Sixth Circuit expressly aligned itself with the Fourth Circuit in holding that an Ohio statutory robbery conviction did not qualify as an ACCA violent felony, in light of Ohio appellate decisions confirming that a robbery by "use of force" under the statute can be accomplished by the minimal amount of force necessary to snatch a purse involuntarily from an individual, or simply "bumping into an individual." 2017 WL 3402084 at *6 (noting accord with the Fourth Circuit in *United States v. Gardner*, 823 F.3d 793, 803-804 (4th Cir. 2016), where that court recognized that under North Carolina law "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response.")

Like the Fourth Circuit in *Gardner*, but unlike the Eleventh Circuit in the case below, the Sixth Circuit in *Yates* meticulously reviewed Ohio appellate caselaw in order to determine whether an Ohio robbery offense qualified as an ACCA violent felony. And in doing so, the Sixth Circuit found significant that several Ohio appellate courts had affirmed robbery convictions where the force applied by the defendant was demonstrably "lower than the type of violent force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at *4. For instance, the Sixth Circuit noted, in *State v. Carter*, 29 Ohio App.3d 148, 504 N.E.2d 469 (1985), a purse snatching

case, an Ohio court had affirmed a robbery conviction where the victim simply had a firm grasp of her purse, the defendant pulled it from her, and then pulled her right hand off her left hand where she was holding the bottom of the purse. *Id.* at 470-471(explaining that this simple incident involved the requisite degree of actual force, "*however miniscule*" to constitute a robbery; citing as support *State v. Grant*, 1981 WL 4576 at *2 (Ohio Ct. App. Oct. 22, 1981), which had held that a mere "bump is an act of violence" within the meaning of the robbery statute, "even though only mildly violent, as the statute does not require a high degree of violence").

In *In re Boggess*, 205 WL 3344502 (Ohio Ct. App. 2005), the Sixth Circuit noted that an appellate court had clarified that the "force" requirement in the Ohio robbery statute would be satisfied so long as the offender "physically exerted force upon the victim's arm so as to remove the purse from her *involuntarily*." *Id.* at *3 (emphasis added). In *Boggess*, the defendant simply grabbed the victim's purse, then jerked her arm back, and kept running." *Id.* at *1.

And in *State v. Juhasz*, 2015 WL 5515826 (Ohio Ct. App. 2015), the Sixth Circuit finally noted, an Ohio court had expressly confirmed that so long as there was "a *struggle* over control of an individual's purse" in any degree, that would be sufficient to establish the "element of force" in the statute. The "struggle need not be prolonged or active; the act of forcibly removing a purse from an individual's shoulder is sufficient." *Id.* at *2. While the *Juhasz* court did not specifically discuss the common law roots of the "struggle" concept in the Ohio robbery caselaw, as

discussed in Mr. Stokeling's petition for certiorari at 16, that is a concept that derives directly from the common law.

In light of the above decisions, the Sixth Circuit found a "realistic probability" that Ohio applied its robbery statute "in such a way that criminalizes a level of force lower than the type of force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at * 5 (citing *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)). And notably, that can be said about Florida as well, given the robbery cases cited in Mr. Stokeling's petition at 24-25 – specifically, *Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993); *Sanders v. State*, 769 So. 2d 506, 507-508 (Fla. 5th DCA 2000); *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001); and *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011) – continually ignored by the Eleventh Circuit.

Had the Sixth Circuit heard Mr. Stokeling's case, and carefully considered the above Florida caselaw in the same manner that it considered Ohio caselaw in *Yates*, it would have found that a Florida robbery as well may be committed by using only a *de minimis* degree force, and therefore does not categorically require the use of violent "physical force" as required by *Curtis Johnson*. The "bump" in *Hayes* is indistinguishable from the "bump" in *Grant*.

As such, *Yates* confirms that the circuit conflict has widened since the filing of Mr. Stokeling's petition for writ of certiorari. For the reasons stated in the petition at 27-28, that conflict is prejudicing Tenth and Eleventh Circuit defendants and should be resolved in this case. And finally, if there were any doubt at the time Mr. Stokeling filed his petition as to whether the Eleventh Circuit might ever

reconsider *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), *cert. denied*, 2017 WL 554569 (June 19, 2017), there can be no such doubt after the recent decision in *Bobby Jo Hardy v. United States*, Slip op. (11th Cir. Aug. 11, 2017), granting the government's motion for "summary affirmance" based upon *Fritts*, and relieving the government from even having to file a responsive brief in an appeal challenging an ACCA enhancement predicated upon a Florida robbery. *See Hardy*, Slip op. at 3 (finding summary affirmance based upon *Fritts* "appropriate because the government is clearly right as a matter of law, and no substantial question exists as to the outcome of the case;" defendant's "convictions categorically qualify as 'violent felonies' under the ACCA based on *Fritts*, and any doubt about that conclusion was put to rest when the Supreme Court denied certiorari in that case").

Hardy confirms that the Eleventh Circuit will not – on its own – ever reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of *violent* force. Without this Court's intervention, Eleventh Circuit defendants will continue to be sentenced harshly and unfairly, unlike their similarly-situated cohorts in the Fourth and Sixth Circuits.

Respectfully submitted,

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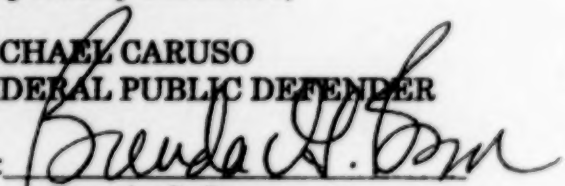
FEDERAL PUBLIC DEFENDER

By: 

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CERTIFICATE OF SERVICE

I certify that on this 29th day of August, 2017, in accordance with SUP. CT. R. 29, eleven (11) copies of the Supplemental Brief for the Petitioner, and Certificate of Service were served by Federal Express upon Jeffrey B. Wall, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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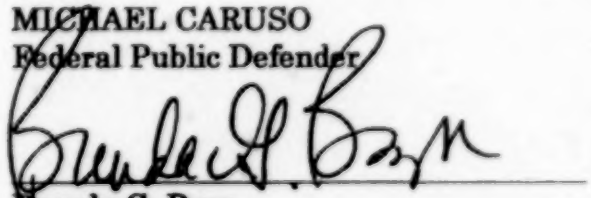
August 29, 2017

By: 

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